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NTSB Order No. EA-3844

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of March, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11052
v.)	
)	
VINCENT BASSET,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator appeals the oral initial decision of Administrative Law Judge William R. Mullins given at the conclusion of an evidentiary hearing.¹ By that decision, the law judge dismissed the 30-day suspension² of respondent's Airline

¹A copy of the initial decision, an excerpt from the transcript, is attached.

²The imposition of the sanction was waived because of respondent's timely report under the Aviation Safety Reporting Program (ASRP).

Transport Pilot (ATP) certificate for his alleged violation of sections 91.75(a), 91.75 (b), and 91.9 of the Federal Aviation Regulations, 14 C.F.R. Part 91.³ We deny the Administrator's appeal.⁴

The Administrator's Order of Suspension alleged, in pertinent part, the following facts:

1. You hold Airman Certificate No. 2305972 with Airline Transport Pilot privileges.
2. On July 16, 1988, you acted as pilot in command of Metroflight (MTR) 3860, a Saab SF340, operating on an IFR flight plan from Tyler, Texas to Dallas/Fort Worth Airport, Texas. At all times material to this flight, your aircraft, MTR 860, was cleared by Fort Worth Air Traffic Control Center (ARTCC) to descend to 6,000 feet. You acknowledged this clearance.
3. You were later advised that you were overtaking an aircraft at 12 o'clock, four miles at 5,000 feet which advisory you did not acknowledge. Computer data indicates that you operated aircraft MTR 860 and descended out of 6,100 feet to an altitude of 5,300

³FAR sections 91.75(a), 91.75(b) and 91.9 provided in pertinent part at the time of the incident as follows:

"§ 91.75 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless he obtains an amended clearance. However, except in positive controlled airspace, this paragraph does not prohibit him from canceling an IFR flight plan if he is operating in VFR weather conditions. If a pilot is uncertain of the meaning of an ATC clearance, he shall immediately request clarification from ATC.

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction."

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

⁴Respondent filed a brief in reply.

feet. Your operations at this altitude placed you 1.6 nm from aircraft N23575. Your operations resulted in both aircraft flying at 5,000 feet, which resulted in a loss of standard IFR separation. You failed to stop your descent at your assigned altitude, and thereby endangered the lives and property of others.

MTR 860 was originally cleared to a cruising altitude of 8,000 feet. Respondent was performing the duties of the non-flying pilot, including radio communications with ATC. About 55 miles from the Dallas/Fort Worth Airport, respondent turned over responsibility for the ATC communications to the flying pilot and contacted the company on the other radio to exchange information that was not essential for the safety of the flight.⁵ While talking to the company, the respondent observed the flying pilot reset the altitude alerter to 5,000 feet. The respondent promptly completed his call on the company radio, resumed monitoring the ATC radio, and questioned the flying pilot about the new clearance. The flying pilot assured the respondent that the new clearance was correct. From previous experience flying this route, the crew was accustomed to receiving ATC instructions to cross the Scurry VOR at various altitudes, including 5,000, 6,000 or 7,000 feet. Respondent, therefore, had no reason to be suspicious of, or to doubt, the 5,000 altitude indicated to him by the flying pilot.

The issue then becomes one of whether the non-flying pilot

⁵The company call was in accordance with an unwritten company policy, and was usually made from about 60 miles out as that was near the maximum range of the company radio. Greater range of the company radio would help to avoid this quandary for the pilots.

was attending to non-safety related duties during a period of critical flight. The law judge was satisfied by a preponderance of the evidence that the new altitude clearance misheard by the flying pilot was a change in cruise altitude rather than the beginning of a descent into the airport, and, therefore, that respondent's change of frequency for non-essential company information did not violate FAR section 121.542.⁶ The Administrator's brief does not present any argument to the contrary, and while the issue is not free from doubt, the Board does not find enough in the record to indicate that the law judge should have found otherwise.

Our inquiry does not stop there, however, because in at least one case, this "sterile cockpit rule" of FAR section 121.542 has been extended to include non-critical phases of the flight if something about the situation should have been a warning to a reasonable pilot that assigning ATC communications to the flying pilot may not be prudent. In *Administrator v. Ross*, NTSB Order No. EA-2378 (1986), the Board affirmed a suspension because an unusual altitude clearance should have alerted respondent that it was not enough to follow the "letter of the law" with regard to conducting company business during a non-critical phase of flight. In the instant case, the Administrator contends that respondent exercised similar poor

⁶Under Federal Aviation Regulation 121.542(a), the non-flying pilot may conduct company business when the flight is not in a critical phase. The Administrator did not allege a violation of this section.

judgment, since the flight was 20 miles away from the Scurry VOR, the point where respondent testified that it was normal to receive clearance to descend, at the time respondent signed onto the company radio. However, the poor judgment present in Ross was in turning attention to non-essential duties before the flight had reached a safe cruise level. In this case, the Administrator is effectively asking the Board to hold that the non-flying pilot cannot turn to non-essential duties if it is possible that those duties might not be completed before a clearance respecting a critical phase of flight is received. We are not persuaded by the Administrator's reasoning. It seems to us that, so long as the non-flying pilot turns his attention to essential duties as soon as the aircraft again enters a critical phase of flight, he should not be faulted for attempting to complete non-essential duties before such a flight phase is entered.

For these reasons, the Board is of the opinion that the law judge did not err in his determination that respondent did not violate the FAR sections cited in the Administrator's complaint.

The Board, therefore, adopts the findings and conclusions of the initial decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. The initial decision is affirmed; and
2. The Administrator's appeal is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.